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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1324

COSDEN OIL & CHEMICAL COMPANY,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 826,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT EASTLAND

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No.

COSDEN OIL & CHEMICAL COMPANY,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 826,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT EASTLAND

The Petitioner, Cosden Oil & Chemical Company, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas at Eastland which was entered in this proceeding on August 2, 1979.

OPINIONS

The opinion of the Texas Court of Civil Appeals, 585 S.W.2d 911 (Tex. Civ. App. 1979), and the order of the Supreme Court of Texas denying the Petition for Writ of

Error, 23 Tex.Sup.Ct.J. 80 (Nov. 28, 1979), appear in Appendix A hereto.

JURISDICTION

The Judgment of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas at Eastland was entered on August 2, 1979. A timely Motion for Rehearing was denied on August 30, 1979. A timely Petition for Writ of Error was denied by the Supreme Court of Texas on November 28, 1979. This Petition of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

A. SHOULD A DISPUTE BETWEEN A COMPANY AND A UNION, CONCERNING THE PROPER METHOD OF SELECTING AN ARBITRATOR UNDER A COLLECTIVE BARGAINING AGREEMENT, BE DECIDED BY THE COURTS OR BY AN ARBITRATOR CHOSEN UNDER THE PROCEDURES IN THE COLLECTIVE BARGAINING AGREEMENT?

B. WHETHER A DISPUTE OVER ARBITRATION PROCEDURE IS TO BE DETERMINED THROUGH ARBITRATION, RATHER THAN THE COURTS, WHERE THE SUBSTANTIVE DISPUTE IS CLEARLY WITHIN THE ARBITRATION CLAUSE.

STATEMENT OF FACTS

The employees of Cosden Oil and Chemical Company ("Cosden") are represented by the International Union of Operating Engineers, Local 826 (the "Union") at the company's Big Spring, Texas refinery and are covered by a Collective Bargaining Agreement (the "Agreement"). This Agreement was in effect at all times relevant to these proceedings and contains a broad and comprehensive grievance-arbitration provision providing for the filing and processing of employees' grievances up to the final step of binding and conclusive arbitration.

On July 12, 1978, Cosden discharged employee Marshall Day. Mr. Day's discharge was made the subject of Grievance No. 78-37 (the "discharge grievance") duly filed by the Union on July 25, 1978.

The parties were unable to voluntarily resolve this grievance and, as called for in the Agreement, jointly requested and received a panel of arbitrators from the Federal Mediation and Conciliation Service ("FMCS") on August 7, 1978. After Cosden completed its review of the names on the first panel of arbitrators, it notified the Union that the panel of arbitrators was totally unacceptable and further indicated that Cosden was requesting a second panel of arbitrators from FMCS. Pursuant to this request, a second panel was furnished to the parties by FMCS; and, upon its receipt, Cosden notified the Union that it was prepared to select an arbitrator from the second panel. However, the Union refused to make its selection of an arbitrator from the second panel and on October 17, 1978, filed a new grievance, No. 78-45, the subject of which was "the refusal of Cosden Oil to select an arbitrator from the first panel." The Union contended in this grievance that Cosden violated

the Agreement when it ordered the second panel.

Grievance No. 78-45 (the "panel grievance") was accepted by the company and processed by the parties according to the contractual grievance procedures provided in the Agreement. Since it was not resolved voluntarily in the grievance process, the Union notified the company that it was proceeding to arbitration, and the *parties jointly requested* a panel of arbitrators from FMCS on December 8, 1978, to hear and decide Grievance No. 78-45, the "panel grievance."

Subsequent to filing the panel grievance, the Union filed suit in State Court seeking an order requiring Cosden to select an arbitrator for the "discharge grievance" from the *first* panel; that is, seeking the identical relief sought by the Union in the "panel grievance." The Petition alleged:

> Plaintiff would show this Court that the language of said contract is mandatory in that the parties must select from the original list of arbitrators, but that the Defendant in bad faith refused to do so and therefore has breached the Collective Bargaining Agreement.

Cosden has contended in the State Court that the issue of whether or not Cosden must strike names from the first panel was not a proper subject for State Court action, that the Court had no jurisdiction to decide same, and that such issue must be decided by an arbitrator selected from the panel forwarded by FMCS to decide Grievance No. 78-45, (the "panel grievance").

The parties each presented Motions for Summary Judgment to the Court and, at the hearing, stipulated to all relevant facts and exhibits. Thereafter, on Feburary 20, 1979, the District Court for the 118th Judicial District of Texas granted the Union's Motion for Summary Judgment, finding that Cosden had breached the Collective Bargaining

Agreement, as a matter of law, by refusing to select an arbitrator from the first panel on the discharge grievance. The Court further ordered Cosden to select an arbitrator from the first panel and enjoined the parties from further processing the "panel grievance" through the grievance-arbitration procedures provided for in the Collective Bargaining Agreement.

Cosden duly appealed to the Texas Court of Civil Appeals for reversal of the trial court's Judgment, but was unsuccessful. Although such court's attention was called to the many United States Supreme Court decisions requiring procedural arbitration disputes to be resolved by an arbitrator, the Appellate Court failed to follow such cases and upheld the jurisdiction exercised by the trial court, stating:

> In the instant case, the agreement entered into between the parties provides for arbitration solely with regard to labor disputes. The present dispute between the parties is not a labor dispute.

The term "labor dispute" is not used in the Agreement at any point and the source of this allegedly limiting language in the Court of Civil Appeals' opinion is a mystery. The Agreement, in pertinent part, provides:

Settlement of Disputes and Grievances

1. An employee has a grievance when such employee suffers a mental, physical or financial loss or hazard as a result of the company's violation of this agreement.

****

4. Should the Industrial Relations Department and the Grievance Committee fail to settle the grievance . . . the case may be referred to arbitration. . . .

****

6. A majority decision of the Arbitration Committee shall be final and binding upon all parties.

The term grievance is defined broadly to include any type of loss as a result of the company's violation of the agreement - an extremely broad definition. Even assuming that the Agreement did limit grievance to "labor disputes," no clue is given by the Court as to why this would not be one!

Petitioner filed a timely Motion for Rehearing in the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, but this Motion was denied on August 30, 1979.

Cosden then duly filed an Application for Writ of Error to the Supreme Court of Texas, which was denied on November 28, 1979. Cosden has thus exhausted its appeals through the State Courts of Texas.

REASONS FOR GRANTING THE WRIT

A. SHOULD A DISPUTE BETWEEN A COMPANY AND A UNION, CONCERNING THE PROPER METHOD OF SELECTING AN ARBITRATOR UNDER A COLLECTIVE BARGAINING AGREEMENT, BE DECIDED BY THE COURTS OR BY AN ARBITRATOR CHOSEN UNDER THE PROCEDURES CONTAINED IN THE COLLECTIVE BARGAINING AGREEMENT?

Once again, a court has been unable to refrain from deciding the *merits* of an arbitrable issue and has substituted its judgment for that of an arbitrator, and has thus violated national labor policy as enunciated frequently by this Court. *Nolde Bros., Inc. v. Local 358, Bakery Workers Union,* 430 U.S. 243, 254-55, 97 S.Ct. 1067, 51 L.Ed.2d 300 (1977); *Gateway Coal Co. v. United Mine Workers of America,* 414 U.S. 368, 382, 94 S.Ct. 629, 38 L.Ed.2d 583

(1974); *John Wiley & Sons v. Livingston,* 376 U.S. 543, 548, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964); *United Steel Workers of America v. American Mfg. Co.,* 363 U.S. 564, 567, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *Textile Workers of America v. Lincoln Mills of Alabama,* 353 U.S. 448, 455, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957).

Where the parties have agreed upon arbitration as the method of resolving disputes, it has been honored by this Court even to the extent of permitting arbitration procedures to survive a corporate merger (*Wiley*) or the termination of the underlying collective bargaining agreement (*Nolde*). In its most recent case, this Court again stated:

> [T]o be consistent with the congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration . . .*[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.* Doubts should be resolved in favor of coverage. *Nolde* 430 U.S. at 254-55. (Emphasis added.)

Can it be said here, with "positive assurance," that the arbitration clause in the Agreement is "not susceptible of an interpretation" that covers a dispute between the parties about the proper procedures for selecting an arbitrator - *i.e.,* the "panel grievance"?

The Texas Courts did not make any such finding and, no doubt, did not wish to articulate such an absurd view in light of the *Union's own act of filing a grievance* protesting Cosden's action! If the arbitration clause is not even "susceptible of an interpretation" placed on it by the company, then why did the Union so interpret it by protesting under the grievance procedure with the filing of the "panel grievance"? A fundamental principle in contract

interpretation cases is that the interpretation placed thereon by the parties will be given great weight. *Denver Metropolitan Ass'n of Plumbing, Heating, Cooling Contractors v. Journeyman Plumbers & Gas Fitters Local No. 3,* 586 F.2d 1367, 1371 (10th Cir. 1978).

Cosden viewed the arbitration procedure as broad enough to encompass the "panel grievance" when it accepted and processed it; and obviously the Union did also, or the grievance would not have been filed! The parties continued to process the "panel grievance" down to and including jointly requesting a panel of arbitrators from FMCS.

The Union's argument, persuasive to the State Courts, was that the Courts were being asked only to enforce the arbitration procedure. Cosden, it was urged, was a violator of the arbitration clause, and an order was needed to make it proceed to arbitration. What was neatly concealed within this argument was that by such an order from a court, the Union was obtaining a final decision on the merits of the "panel grievance." The Texas Courts thus substituted their opinion for that of an arbitrator that should have been selected to decide the "panel grievance."

The Texas Courts decided that Cosden had erred in requesting a second panel, that the Union's "panel grievance" had merit, and that Cosden should be ordered to select an arbitrator for the "discharge grievance" from the first panel submitted. Having thus decided the merits of the issue, the Courts then ordered the parties to cease processing the "panel grievance" to arbitration. Thus, instead of enforcing arbitration, the Union sought and obtained a resolution by a court of the dispute, while Cosden sought to obtain resolution thereof via arbitration - the heretofore judicially favored method.

B. WHETHER A DISPUTE OVER ARBITRATION PROCEDURE IS TO BE DETERMINED THROUGH ARBITRATION, RATHER THAN THE COURTS, WHERE THE SUBSTANTIVE DISPUTE IS CLEARLY WITHIN THE ARBITRATION CLAUSE.

Long ago, in *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 548, 84 S.Ct. 909, 11 L.Ed.2d 898 (1954), the Court held:

> Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and which bear upon its final disposition should be left to the arbitrator.

Thus, in *Wiley,* this Court approved, as a general policy, the view that questions relating to arbitration procedure should be entrusted to the arbitrator.

The Texas Court of Civil Appeals held that the procedural question was not arbitrable because it was not a "labor dispute" within the terms of the arbitration clause. This view mistakenly requires a collective bargaining agreement to affirmatively grant arbitration jurisdiction over matters of arbitration procedure. However, the view which adheres to the policy favoring arbitration is that such power is inherent in the grant of arbitration power over the substantive dispute, at least in the absence of any contractual language specifically excluding procedural questions from arbitration. The Seventh Circuit Court has held in accordance with the latter view:

> It's the court's duty to interpret the meaning of the arbitration clause, *i.e.,* whether a given dispute is arbitrable, unless the agreement clearly states to the contrary. *This rule does not, however, extend to*

> *interpreting procedural provisions of the agreement to arbitrate once it appears that an arbitrable dispute exists. Local 81, American Federation of Technical Engineers, AFL-CIO v. Western Electric Co.*, 508 F.2d 106, 109 (7th Cir. 1974). (Citation omitted; emphasis added.)

One matter presented for this Court's determination is the scope of the duty to resolve questions of arbitration procedure through the arbitration process rather than the courts. The decision in *Wiley* concerning the arbitration of procedural questions was grounded on the intertwining of the substantive and procedural grievances *and* the general policies of Federal law favoring arbitration, including the delays attendant to litigation of these issues.

In *Tobacco Workers International, Local 317 v. Lorillard Corp.*, 448 F.2d 949, 953 (4th Cir. 1971), the court rejected the argument that procedural questions were not arbitrable where the facts surrounding the procedural and substantive claims were not "intertwined." The Fourth Circuit Court considered the other rationale given for the *Wiley* decision as being sufficient to order arbitration of the procedural questions in that case. The decisions in *Wiley* and *Lorillard* noted that the arbitrator would be expected to hear and resolve the procedural dispute far more expeditiously than the courts; in fact, it is likely that both the procedural and the substantive disputes in this case could have been arbitrated and disposed of in substantially less time than it has taken to reach this Court. Additionally, arbitrators possess special knowledge and expertise which they could bring to bear on the procedural question. The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).

The case at bar does present a question somewhat different in that the procedural question is one which must, by its nature, be determined by either a separate arbitration proceeding or by the courts before the primary, substantive grievance can be submitted to arbitration. Admittedly, the opinions in both *Wiley* and *Lorillard* noted that the submission of the procedural disputes to arbitration would avoid the fractionating of the dispute into separate substantive and procedural aspects with the attendant delay. Here, the very nature of the procedural dispute requires that a separate determination be made by somebody, whether arbitrator or judge. However, the central concerns of speed in resolving disputes and the special competence of the arbitrator are applicable here. Additionally, the parties are presumed to be aware of the strong Federal policy favoring arbitration in this context, including the preference for arbitration of procedural questions. By agreeing to arbitrate the substantive question without specifically excluding the arbitration of procedural questions arising out of the matter, the parties are presumed to have intended these questions to be arbitrated.

In keeping with this policy, several of the lower Federal courts have *refused* to decide a variety of procedural arbitration issues in situations similar to that presented here. In *United Auto Workers v. Allis-Chalmers Corp.*, 447 F.Supp. 773 (B.D. Wisc. 1978), the union had filed seven grievances under the collective bargaining agreement. As in the "discharge grievance" in this case, there was no dispute as to the subject matter arbitrability of these grievances. However, the company took the position that the grievances were required to be submitted to the arbitrator in the order in which notice of arbitration was given. The union, on the other hand, asserted that the grievances could be taken to

arbitration in any order and that the company's imposition of a condition that grievances be submitted to arbitration in a given order constituted a refusal to arbitrate. The court properly refused to determine the question of whether the grievances had to be submitted in a given order. It held that this procedural question was one that should be decided by an arbitrator. The court, therefore, held that the procedural question should be certified to the arbitrator in a separate grievance, as was initially done in the "panel grievance" in this case, the very grievance which the lower courts prevented from proceeding to arbitration.

Similarly, in *American Sterilizer Co. v. United Auto Workers,* 341 F.Supp. 522 (W.D. Pa. 1972), the court held that the question of whether multiple grievances could be arbitrated together was a procedural question to be determined by the arbitrator. The company's motion to dismiss was, therefore, granted.

Arbitrators are again better equipped than the courts to deal with such questions. *See,* for example, the decision in *Sinclair Refining Co. v. Oil Workers International Union, Local 7-210,* 38 Lab. Arb. 1251 (1962) (Gilden, Arb.), where the arbitrator decided the procedural question of whether the grievance was barred due to delays resulting from the rejection of panels of arbitrators and requests for additional panels.

CONCLUSION

Although the underlying argument between the parties - which panel will be utilized in choosing an arbitrator for the discharge grievance - is of little consequence in and of itself to this Honorable Court, the Texas Courts' judgment

represents a dramatic departure from National Labor Policy *which can have far reaching results!* As demonstrated in the *American Sterilizer Co.* and *Sinclair Refining Co.* cases, *supra,* the lower Federal courts have learned and applied restraint in favor of an arbitrator's decision if the agreement of the parties could possibly be construed to cover such a dispute.[1] Similarly, the labor bar has been conditioned to take all such disputes to arbitration.[2] Such a fundamental deviation from this Court's consistent pronouncements concerning arbitration clauses and the limited judicial role as related thereto, should not be allowed to stand. The confusion in the Texas Courts apparently resulted because of the purely procedural nature of the dispute. This Honorable Court can put to rest, once and for all, any question that National Labor Policy extends to arbitration of such disputes.

Cosden respectfully prays that this Petition be granted and that the lower court's Judgment be reversed and that Cosden's Motion for Summary Judgment be granted.

Respectfully submitted,

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By: Durwood D. Crawford
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[1]The Texas Courts have returned to the judicial review concept (often criticized) as stated in *Torrington Co. v. Metal Products Workers Union, Local 1645,* 362 F.2d 677 (2nd Cir. 1966).

[2]The undersigned law firm has participated in cases wherein the Fifth Circuit Court compelled arbitration based upon a broad reading of an arbitration cluase (*Palestine Telephone Co. v. Local 1506, I.B.E.W.,* 379 F.2d 234 [5th Cir. 1967]) and enforced an arbitration award (*Gulf States Telephone Co. v. Local 1692, I.B.E.W.,* 416 F.2d 198 [5th Cir. 1969]).

APPENDIX A

NO. 25,102

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 826	)	IN THE 118TH JUDICIAL
	)	DISTRICT COURT OF
VS.	)	
COSDEN OIL AND CHEMICAL COMPANY, A WHOLLY OWNED SUBDIVISION OF AMERICAN PETROFINA, INC.	)	HOWARD COUNTY, TEXAS

JUDGMENT

On the 29th day of January, 1979, came on to be considered in the above styled and numbered cause, the Plaintiff's Motion for Summary Judgment, the Defendant's Motion for Summary Judgment, and Defendant's Motion to Dismiss; and the parties both appeared by their respective attorneys of record and announced ready for trial on all matters including the merits of the case, and the Court considered the pleadings of the parties, the Affidavits on file, the Stipulation of Facts (a copy of which is attached hereto and incorporated by reference herein) entered into of record by the attorneys for the respective parties, and argument of counsel and after which, the Court hereby renders the

following Judgment:

IT IS ORDERED, ADJUDGED AND DECREED that the Defendant's Motion for Summary Judgment and Defendant's Motion to Dismiss are overruled and denied.

IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for Summary Judgment is granted, and the Court so finds as a matter of law that the Defendant breached the collective bargaining agreement made te subject of this cause and refused to arbitrate the Union's Grievance No. 78-37 by failing to select from the list of arbitrators submitted by the F.M.C.S. on August 7, 1978. It is the further Order of this Court that the parties, both Plaintiff and Defendant, shall cease and desist from further processing of the Union's Grievance No. 78-45 through the grievance-arbitration procedure set out in the collective bargaining agreement.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendant is in breach of the collective bargaining agreement and the Court orders the Defendant to forthwith select from the arbitration panel furnished the parties by the F.M.C.S. on August 7, 1978.

SIGNED THIS 20th day of February, 1979.

JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

DURWOOD D. CRAWFORD,
Attorney for Cosden Oil &
Chemical Company

Cosden Oil & Chemical Company.
Appellant
Vs. No. 5345 — Appeal from Howard County
International Union of Operating Engineers, Local No. 826
Appellee

This is a summary judgment case. International Union of Operating Engineers, Local No. 826, sued Cosden Oil & Chemical Company, a wholly owned subdivision of American Petrofina Incorporated, seeking specific performance of a collective bargaining agreement entered into between the parties. Cosden's motion for summary judgment and motion to dismiss were denied. Union's motion for summary judgment was granted. Cosden appeals. We affirm.

The following facts were stipulated to between the parties: Cosden and Union entered into a collective bargaining agreement covering certain of Cosden's employees at its plant in Big Spring, Texas. Article VIII of the agreement provides in part:

SETTLEMENT OF DISPUTES AND GRIEVANCES

1. An employee has a grievance when such employee suffers a mental, physical, or financial loss or hazard as a result of the COMPANY'S violation of this Agreement.

2. An individual employee or employees shall either in person or through their Steward, within five (5) days of such employee's or employees' knowledge of the occurance of the event complained of, first seek adjustment through their immediate foreman who shall within three (3) days provide an answer in writing to the complaining party.

3. Failing to reach a satisfactory understanding or adjustment through the immediate foreman, the ag-

grieved employee shall within five (5) days after receipt of such foreman's written answer present the case in writing to the Industrial Relations Department of the COMPANY and the Grievance Committee for settlement.

4. Should the Industrial Relations Department and the Grievance Committee fail to settle the grievance, the Industrial Relations Department shall notify the UNION fifteen (15) days after the meeting, in writing, of such fact; and within thirty (30) days after receipt thereof the case may be referred to arbitration by a committee consisting of three (3) members, one (1) to be appointed by the COMPANY, one (1) to be appointed by the Union, and the third (3rd) selected by the first two (2). If the two (2) members selected by the COMPANY and the UNION are unable to agree upon the third (3rd) member within seven (7) days after appointment, the COMPANY and the UNION shall jointly request in writing that the Director of Federal Mediation and Conciliation Service designate a panel of five (5) from which the parties will select the third (3rd) arbitrator.

5. The time period provided above shall exclude all leaves of absence, holidays, vacations, and regularly scheduled days off.

6. A majority decision of the Arbitration Committee shall be final and binding upon all parties. In such cases the COMPANY and the UNION shall furnish the Arbitration Committee all information in their possession necessary to a full understanding of the subject matter of the grievance. Each party shall pay the expenses of its own selected members, and the parties shall each pay one-half (1/2) of the expenses of the third (3rd) member.

7. The Business Representative of Local No. 826 shall be permitted access to any of the operations represented by Local 826 for the purpose of investi-

gating any dispute arising between the COMPANY and the UNION. There shall be no interruption of work by the UNION representatives unless the Foreman in charge shall have previously granted permission.

Cosden discharged employee Marshall Day and his discharge was made the subject of Grievance No. 78-37 filed by the Union. The discharge of an employee was recognized as a proper subject of the grievance and arbitration procedures provided for in the agreement.

The parties jointly requested a panel of arbitrators from the Fedeal Mediation and Conciliation Service. Upon receipt and review of the panel of arbitrators furnished, Cosden notified the Union that the panel was totally unacceptable and indicated it was requesting a second panel of arbitrators. Cosden notified the Union, upon receipt of a second panel, that it was prepared to select an arbitrator from such panel. Union refused to make its selection of an arbitrator from the second panel and filed Grievance No. 78-45 whose subject was "the refusal of Cosden Oil to select an arbitrator from the first panel," which grievance, as stipulated between the parties, "Cosden Oil has accepted, with the grievance being processed per the usual procedures provided for under the Collective Bargaining Agreement."

The parties specifically stipulate:

15. That on or about November 22, 1978, the Operating Engineers advised Cosden Oil of its wishes to proceed to arbitration on Grievance No. 78-45, and in such correspondence, further named its Union arbitrator and requested advice from Cosden Oil as to the name of the Company arbitrator; a true and correct copy of that correspondence from the Operating Engineers being admitted into evidence without objection as Defendant's Exhibit 3.

16. That, by correspondence dated November 29, 1978, Cosden Oil advised the Operating Engineers of

its receipt of the correspondence marked as Defendant's Exhibit 2 from the Operating Engineers, and further, Cosden Oil advised that Mr. Barnwell would serve as the Company's arbitrator on Grievance No. 78-45; a true and correct copy of such correspondence being marked as Defendant's Exhibit 3 and admitted into evidence without objection.

13. That, by correspondence dated December 8, 1978, the Operating Engineers forwarded to Cosden Oil, by cover letter, the request of the Operating Engineers to FMCS for a panel of arbitrators for Grievance No. 78-45, which "Request for Arbitration Panel" was duly signed by Mr. Barnwell for Cosden Oil and Mr. Howell for the Operating Engineers. A true and correct copy of the correspondence from the Union dated December 8, 1978, being marked for identification as Defendant's Exhibit 4, and admitted without objection. A true and correct copy of the "Request for Arbitration Panel" for Grievance No. 78-45 being marked for identification as Defendant's Exhibit 5, and admitted into evidence without objection.

The subject matter of the Union petition in the instant cause is identical to the subject matter of Grievance No. 78-45 being, "Whether or not Cosden Oil was entitled to refuse to select an arbitrator from the first panel submitted for the arbitration of Grievance of No. 78-37 (the discharge of Marshall Day)."

The thrust of Cosden's appeal is that the trial court has erroneously assumed the role of arbitrator in deciding who shall prevail on the merits of the arbitration in Grievance No. 78-45. We disagree.

In support of its position Cosden cites cases which provide:

> "The question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which is bargained for;

> and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." Enterprise Wheel & Car Corp. 363 U.S., at 599, 4 L.Ed.2d 1424, 80 S.Ct. 1358, 46 LRRM, at 2426. . . .

In short, in labor cases to compel arbitration, there are only two issues before the Court: (1) whether an agreement to arbitrate exists; and (2) whether the particular dispute in question is susceptible to arbitration under the agreement. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 564, 583 n. 7 & 585, 46 LRRM 2416, 2420 (1960); Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241, 50 LRRM 2433 (1962). As pointed out above, if there are any doubts as to the susceptibility of the dispute to arbitration, these doubts are to be resolved in favor of arbitration. Warrior & Gulf, supra, 363 U.S. at 582-583, 46 LRRM at 2419-2420.

The court in United Steelworkers v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960), stated:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.

Justice Brennan in *United Steelworkers* said:

> To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute. In this sense, the question of whether a dispute is "arbitrable" is inescapably for the court.

In the instant case, the agreement entered into between the

parties provides for arbitration solely with regard to labor disputes. The present dispute between the parties is not a labor dispute.

Appropriate summary judgment rules support the ruling of the trial court. Gibbs v. General Motors Corporation, 450 S.W.2d 827 (Tex. 1970); Great American Reserve Insurance Company v. San Antonio Plumbing Supply Company, 391 S.W.2d 41 (Tex. 1965); and Oram v. General American Oil Company of Texas, 513 S.W.2d 533 (Tex.1974)

We have considered and overrule all points of error.

The judgment is affirmed.

RALEIGH BROWN
ASSOCIATE JUSTICE

August 2, 1979

JUDGMENT

Cosden Oil & Chemical Company,	) From the 118th District) Court of Howard County.
Vs. No. 5345	) August 2, 1979
International Union of Operating Engineers, Local No. 826	) Opinion by Brown, A. J.)

This cause came on to be heard on the record and the same being inspected, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court be, and the same is hereby, in all things affirmed, in accordance with this Court's opinion. It is further ordered that the costs incurred by reason of this appeal be, and the same are hereby, tried against appellant, Cosden Oil & Chemical Company, principal, and Seaboard Surety Corporation, surety on its appeal bond, for which let execution issue, and that this decision be certified below for observance.

Cosden Oil & Chemical Company	) August 30, 1979)
Vs. No. 5345	)
International Union of Operating Engineers, Local No. 826	) This day came on to be) heard Appellant's)

motion for rehearing and the same, having been duly considered, is hereby overruled.

- - - - - - - - - - - - - - -

IN THE SUPREME COURT OF TEXAS

November 28, 1979

No. B-8854

COSDEN OIL AND CHEMICAL COMPANY	)	
	)	From HOWARD County,
vs.	)	ELEVENTH District.
	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 826	)	

Application of petitioner for writ of error to the Court of Civil Appeals for the Eleventh Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant COSDEN OIL AND CHEMICAL COMPANY and its surety SEABOARD SURETY CORPORATION

pay all costs incurred on this application.

No. _____

	)	
	)	From County,
vs.	)	
	)	District.
	)	

Petitioner motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 14th day of February, 1980.

GARSON R. JACKSON, Clerk

By _____ , Deputy.
/s/ RICHARD P. BRAUN
RICHARD P. BRAUN

APPENDIX "B"

SUMMARY OF PLEADINGS AND MOTIONS PRESERVING FEDERAL QUESTIONS IN STATE COURTS

NO. 25,102

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 826	§	IN THE 118TH DISTRICT COURT
	§	IN AND FOR
VS.	§	
	§	HOWARD COUNTY,
COSDEN OIL & CHEMICAL COMPANY, A Wholly Owned Sub-Division of American Petrofina, Inc.	§	TEXAS

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * *

I.

Plaintiff's suit against Cosden Oil is for alleged breach of the arbitration provisions of a collective bargaining contract. Plaintiff's specific complaint for breach of contract is

Cosden Oil's allegedly unlawful refusal to select an arbitrator from the initial panel designated by the Federal mediation and Conciliation Service ("FMCS"). While not plainly stated in Plaintiff's Petition, its true underlying complaint against Cosden Oil is the argument that Cosden Oil is not entitled to make a request for an additional panel from FMCS. This request by Cosden Oil for a second panel of arbitrators is also the subject of a subsequent grievance filed by Plaintiff pursuant to the grievance-arbitration procedures in the Collective Bargaining Agreement. These facts and circumstances are attested to in the Affidavit of Defendant's agent, Mr. Hood Barnwell, a copy of which is attached hereto and incorporated by reference herein.

Therefore, the dispute between the parties involves a question of contract interpretation, as well as a question of the arbitrability of the dispute (i.e. whether or not an arbitrator should be selected to resolve the dispute).

II.

Cosden Oil would show that the disputes between the parties, according to a long line of decisions by the United States Supreme Court, must be resolved through the grievance-arbitration procedure provided for under the Collective Bargaining Agreement. As a matter of law, as stated in the accompanying Brief, it would be improper under the terms of that Collective Bargaining Agreement for the grievance-arbitration procedure to be bypassed in favor of the resolution of this Court. Therefore, this suit should be dismissed in its entirety to allow the orderly handling of this case through the grievance-arbitration process previously agreed to by the parties and the subject of a formal agreement.

* * *

DEFENDANT'S MOTION TO DISMISS

I.

Plaintiff's action against Cosden Oil for breach of contract and specific performance is based upon the alleged refusal of Cosden Oil to select an arbitrator from a panel designated by the Federal Mediation and Conciliation Service ("FMCS"). Cosden Oil has made a request of the Federal Mediation and Conciliation Service for designation of an additional panel from which the parties may select the arbitrator. Although not specifically so stated in Plaintiff's Original Petition, the underlying basis for the lawsuit is Plaintiff's argument that Cosden Oil is not entitled to request an additional panel from FMCS.

II.

This dispute between the parties therefore raises an issue of procedural arbitrability. The resolution of such a dispute, according to a long line of United States Supreme Court decisions, must first be attempted through the grievance-arbitration process provided for under the collective bargaining agreement. Cosden Oil believes there is no dispute that Plaintiff has failed to make any effort to raise this issue of procedural arbitrability through the grievance-arbitration procedures provided for under the collective bargaining agreement. Thus, this issue is not properly before this Court, and the Petition should be dismissed in favor of resolution of the dispute by the collective bargaining and grievance-arbitration procedures.

III.

Alternatively, and without waiving any of the foregoing, Cosden Oil moves that these proceedings be abated until such time as the parties have exhausted the remedies available under the grievance-arbitration procedures provided for under the collective bargaining agreement.

* * *

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

In support of this motion, Plaintiff relies upon the pleadings and the Answers to Requests for Admissions filed herein where it is undisputed that the cause of action is based upon a breach of contract by the Defendant pursuant to a collective bargaining agreement and therefore, the Plaintiff, International Union of Operating Engineers, Local 826, is entitled to specific performance as a matter of law.

* * *

NO. 5345

IN THE
COURT OF CIVIL APPEALS
FOR THE
ELEVENTH SUPREME JUDICIAL DISTRICT
OF TEXAS AT EASTLAND

COSDEN OIL & CHEMICAL COMPANY,
Appelant

VS.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 826,
Appellee

APPEALED FROM THE DISTRICT COURT OF
HOWARD COUNTY, TEXAS
118TH JUDICIAL DISTRICT

BRIEF OF APPELLANT

* * *

I.

The trial court erred in rendering summary judgment on behalf of Plaintiff.

II.

The trial court erred in denying Defendant's Motion for Summary Judgment and Motion to Dismiss.

III.

The trial court erred in granting Plaintiff's Motion for Summary Judgment because, as a matter of law, the question of whether Defendant could refuse to select from one panel of arbitrators and demand another panel is itself a proper subject for arbitration under the collective bargaining agreement.

IV.

The trial court erred in denying Defendant's Motion for Summary Judgment and Motion to Dismiss because, as a matter of law, the question of whether Defendant could refuse to select from one panel of arbitrators and demand another panel is itself a proper subject for arbitration under the collective bargaining agreement.

* * *

POST-HEARING BRIEF OF APPELLANT

COMES NOW, COSDEN OIL & CHEMICAL COMPANY, Appellant herein and pursuant to Leave of Court files this its Post-Hearing Brief covering the following points:

POINT 1

All issues of procedural arbitrability are to be decided by the Arbitrator rather than the Court.

POINT 2

In the event of doubt as to the arbitrability of an issue, same is to be resolved in favor of arbitration as distinguished from the decision of the Court.

* * *

MOTION FOR REHEARING

* * *

I.

The Court of Civil Appeals erred in affirming the judgment of the trial court which rendered summary judgment on behalf of Plaintiff.

II.

The Court of Civil Appeals erred in not reversing and rendering judgment on behalf of Defendant pursuant to Defendant's Motion for Summary Judgment or, alternatively, Defendant's Motion to Dismiss.

III.

The Court of Civil Appeals erred in affirming the summary judgment on behalf of Plaintiff because, as a matter of law, the question of whether Defendant could refuse to select from one panel of arbitrators and demand another panel is a proper subject for arbitration under the collective bargaining agreement.

IV.

The Court of Civil Appeals erred in not granting Defendant's Motion for Summary Judgment or, alternatively, Defendant's Motion to Dismiss because, as a matter of law, the question of whether Defendant could refuse to select from one panel of arbitrators and demand another panel is a proper subject for arbitration under the collective bargaining agreement.

V.

The Court of Civil Appeals erred in affirming the summary judgment on behalf of Plaintiff because the question presented by grievance number 78-45 was a question of procedural arbitrability which should have been determined by the arbitrator.

VI.

The Court of Civil Appeals erred in not granting Defendant's Motion for Summary Judgment or, alternatively, Motion to Dismiss because the question presented by grievance number 78-45 was a question of procedural arbitrability which should have been determined by the arbitrator.

VII.

The Court of Civil Appeals erred in affirming the summary judgment on behalf of Plaintiff because Plaintiff has invoked the arbitration procedure to resolve this dispute, but has failed to exhaust its remedies under the arbitration agreement.

VIII.

The Court of Civil Appeals erred in not granting Defendant's Motion for Summary Judgment or, alternatively, Defendant's Motion to Dismiss because Plaintiff has invoked the arbitration procedure to resolve this dispute, but has failed to exhaust its remedies under the arbitration agreement.

* * *

NO. B-8854

IN THE
SUPREME COURT
OF TEXAS

COSDEN OIL & CHEMICAL COMPANY,

Petitioner

VS.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 826,

Respondent

APPEALED FROM THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT EASTLAND

PETITION FOR WRIT OF ERROR

---

* * *

I.

The Court of Civil Appeals erred in affirming the judgment of the trial court which rendered summary judgment on behalf of Plaintiff. (Germane to Cosden's Motion for Rehearing, Point I).

II.

The Court of Civil Appeals erred in not reversing and rendering judgment on behalf of Defendant pursuant to Defendant's Motion for Summary Judgment, or, alternatively, Defendant's Motion to Dismiss. (Germane to Cosden's Motion for Rehearing, Point II).

III.

The Court of Civil Appeals erred in affirming the Summary Judgment on behalf of Plaintiff because, as a matter of law, the question of whether Defendant could refuse to select from one panel of arbitrators and demand another panel is a proper subject for arbitration under the collective bargaining agreement. (Germane to Cosden's Motion for Rehearing, Point III).

IV.

The Court of Civil Appeals erred in not granting Defendant's Motion for Summary Judgment or, alternatively, Defendant's Motion to Dismiss because, as a matter of law, the question of whether Defendant could refuse to select from one panel of arbitrators and demand

another panel is a proper subject for arbitration under the collective bargaining agreement. (Germane to Cosden's Motion for Rehearing, Point IV).

V.

The Court of Civil Appeals erred in affirming the Summary Judgment on behalf of Plaintiff because the question presented by Grievance No. 78-45 was a question of procedural arbitrability which should have been determined by the arbitrator. (Germane to Cosden's Motion for Rehearing, Point V).

VI.

The Court of Civil Appeals erred in not granting Defendant's Motion for Summary Judgment, or, alternatively, Motion to Dismiss because the question presented by Grievance No. 78-45 was a question of procedural arbitrability which should have been determined by the arbitrator. (Germane to Cosden's Motion for Rehearing, Point VI).

VII.

The Court of Civil Appeals erred in affirming the Summary Judgment on behalf of Plaintiff because Plaintiff has invoked the arbitration procedure to resolve this dispute, but has failed to exhaust its remedies under the arbitration agreement. (Germane to Cosden's Motion for Rehearing, Point VII).

VIII.

The Court of Civil Appeals erred in not granting Defendant's Motion for Summary Judgment, or, alternatively, Defendant's Motion to Dismiss because Plaintiff has invoked the arbitration procedure to resolve this dispute, but has failed to exhaust its remedies under the arbitration agreement. (Germane to Cosden's Motion for Rehearing, Point VIII).

* * *

Supreme Court, U. S.
FILED
MAR 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 79-1324

COSDEN OIL AND CHEMICAL COMPANY,
Petitioner

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 826,
Respondent

ANSWER TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT EASTLAND

JAMES R. EDWARDS
EDWARDS AND ASSOCIATES
P. O. Box 1468
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. _____

COSDEN OIL AND CHEMICAL COMPANY,
Petitioner

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 826,
Respondent

ANSWER OF RESPONDENT TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

The Respondent, International Union of Operating Engineers, Local 826, files this Answer to Petitioner's, Cosden Oil and Chemical Company, Petition for Writ of Certiorari and would respectfully pray that said Writ of Certiorari be in all things denied for the following reasons:

OPINION

The opinion of the Texas Court of Civil Appeals, 585 S.W.2d 911 (Tex. Civ. App. 1979) and the order

of the Supreme Court of Texas denying the Petition for Writ of Error, 23 Tex. S. Ct. J. 80 (Nov. 28, 1979) are correct.

JURISDICTION

This Honorable Court does not have jurisdiction of this dispute under 28 U.S.C., Sec. 1257(3) because there is no question involved in this dispute regarding a treaty or statute of the United States; the validity of a State statute is not drawn in question on the grounds of its being repugnant to the Constitution; there is no question in dispute regarding treaties or laws of the United States; there is no title, right, privilege or immunity set up or claimed under the Constitution, treaties or statute of or concession held or authority exercised under the United States.

The question in this case is a suit on breach of contract and enforcement of the contract language by way of specific performance and therefore, the Court has no jurisdiction.

STATEMENT AND NATURE OF THE CASE

The Court of Civil Appeals has correctly stated the nature and result of the case. The Respondent will not restate the facts, however, the Respondent would point out to this Court that the Petitioner breached the collective bargaining agreement and refused to arbitrate Union Grievance No. 78-37 by failing to select from the list of arbitrators submitted by the F.M.C.S. on August 7, 1978.

Respondent's contention is that the Petitioner flagrantly breached the arbitration clause and that his refusal to

arbitrate this grievance was squarely before the Court below, and based upon the evidence, admissions and language of the arbitration agreement, there was no genuine issue of fact, and the Court below was duty bound, as a matter of law, to rule in favor of the Respondent and order specific performance of the collective bargaining agreement pertaining to arbitration.

The Honorable Court of Civil Appeals correctly held that the collective bargaining agreement between the parties provides for arbitration *solely* with regard to labor disputes and the dispute regarding selecting an arbitrator is not a labor dispute. This being true, the Supreme Court of Texas properly denied the Petitioner's Writ of Error.

RESPONDENT'S ANSWER TO PETITIONER'S REASONS FOR GRANTING THE WRIT

The Court of Civil Appeals did not err as contended in Petitioner's Petition for Writ of Certiorari, but correctly decided this appeal in favor of the Respondent.

ARGUMENT AND AUTHORITIES

The Respondent will brief his Answers to Petitioner's Reasons for granting their Writ of Certiorari together.

Respondent wishes to set out the specific article, Art. 8, Sec. 4 of the collective bargaining agreement which is at issue:

> "Should the Industrial Relations Department and the Grievance Committee fail to settle the grievance, the Industrial Relations Department will notify the union fifteen (15) days after the meeting, in writing, of such fact; and within thirty (30) days after receipt thereof, the case may be referred to arbitration by

> a committee consisting of three (3) members, one (1) to be appointed by the company, (referring to the Defendant), one (1) to be appointed by the union, (referring to the Plaintiff), and the third (3) selected by the first two (2). If the two (2) members selected by the company and the union are unable to agree upon the third (3) member within seven (7) days after appointment, the company and the union *shall* jointly request in writing that the Director of Federal Mediation and Conciliation Service designate a panel of five (5) from which the parties *will* select the third (3) arbitrator."

This Court can readily see that the above provision is a mandatory provision requiring the company and the union to select from the first panel designated by the Director of Federal Mediation and Conciliation Service.

The word "shall" as used in statutes, contracts, or the like, is generally meant to mean imperative or mandatory. The word "will" has the mandatory sense of "shall" or "must". See *Black's Law Dictionary, Seventh Edition.*

Petitioner's refusal to strike from the first arbitration list is a refusal to arbitrate. Without an arbitrator there could be no arbitration. As previously stated, a casual reading of Art. 8, Sec. 4 of the contract leaves no other interpretation than the parties must strike from the first panel.

It is undisputed that Grievance 78-37 was an arbitral grievance as it was a discharge case. Therefore, the Court below was called upon to decide if the refusal of the Petitioner to select an arbitrator under the clear language of Art. 8 was a breach of the contract and if so, to enforce the contract.

The arbitration clause regarding the selection of an arbitrator is not susceptible to any other interpretation other than the parties must select from the first panel.

The nature of the union's claim and the meaning of the arbitration clause is evident and any ambiguity is the result of the Petitioner's patently impossible or unreasonable interpretation. Therefore, the Trial Court had to construe the language of the contract as finally agreed upon in accordance with the ordinary rules of construction and find that the refusal to strike from the first panel was a refusal to arbitrate in accordance with the contract.

This Court, as well as the Courts below, is called upon to determine whether or not the Petitioner's refusal to arbitrate under the clear language of the collective bargaining agreement was a breach of the collective bargaining agreement, then the Trial Court below would have had the right to require specific performance of the arbitration clause as it did.

The jurisdiction of the State Court over a suit for violation of the collective labor contract between an employer and a labor union, representing the employees, is not divested by Sec. 301(a) of the Labor-Management Relations Act of 1947, 29 USC Sec. 185(a). *Charles Dowd Box Company v. John F. Courtney,* 368 U.S. 502, 7 L.Ed.2d 483, 82 S.Ct. 519 (1961). This Court has held on numerous occasions that agreements to arbitrate grievance disputes contained in a collective bargaining agreement should be specifically enforced by the Courts in pursuance to the provisions therein. *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U.S. 448, 1 L.Ed.2d 972, 77 S.Ct. 912 (1957); *Goodall-Sanford, Inc. v. United Textile Workers of America,* 353

U.S. 550, 1 L.Ed.2d 1031, 77 S.Ct. 920 (1957); *General Electric Company v. Local 205, United Electrical Radio and Machine Workers of America,* 353 U.S. 547, 1 L.Ed. 2d 1028, 77 S.Ct. 921 (1957).

The contract signed by an employer, such as the Petitioner, and the union provided that the worker's grievance would be handled pursuant to a specific specified procedure. The last step in the procedure was arbitration. But the Petitioner, by refusing to select from the first panel of arbitrators, effectively prevented arbitration and finally denied the union the request to arbitrate under the contract language. The above *Textile Workers* cases, supra have held that Sec. 301 of the Labor-Management Relations Act is more than jurisdiction. It authorizes the Federal Court to fashion a body of Federal Laws for the enforcement of union contracts and includes within that Federal Law specific performance of promises to arbitrate grievances under union contracts.

Plainly, the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. Viewed in this light, the Legislation does more than confer jurisdiction in the Courts over labor organizations. It expresses a policy that Courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can best be obtained only in that way.

In *John Wiley & Son, Inc. v. Livingston,* 376 U.S. 543, 11 L.Ed.2d 894, 84 S.Ct. 909 (1964), this Court has held that whether or not an employer is bound to arbitrate under the provisions of a collective bargaining agreement as well as what issues he must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.

The Court of Civil Appeals' Justice Raleigh Brown has correctly held:

"The thrust of Cosden's appeal is that the trial court has erroneously assumed the role of arbitrator in deciding who shall prevail on the merits of the arbitration in Grievance No. 78-45. We disagree."

In support of its position, Cosden cites cases which provide:

> "The question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which is bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." Enterprise Wheel & Car Corp., 363 U.S., at 599, 4 L.Ed.2d 1424, 80 S.Ct. 1358, 46 LRRM, at 2426 . . .
>
> In short, in labor cases to compel arbitration, there are only two issues before the Court: (1) whether an agreement to arbitrate exists; and (2) whether the particular dispute in question is susceptible to arbitration under the agreement. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 564, 583 n. 7 & 585, 46 LRRM 2416, 2420 (1960); Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241, 50 LRRM 2433 (1962). As pointed out above, if there are any doubts as to the susceptibility of the dispute to arbitration, these doubts are to be resolved in favor of arbitration. Warrior & Gulf, supra, 363 U.S. at 582-583, 46 LRRM at 2419-2420.

The Court in *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960), stated:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.

Justice Brennan in *United Steelworkers* said:

> To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute. In this sense, the question of whether a dispute is "arbitrable" is inescapably for the court

In the instant case, the agreement entered into between the parties provides for arbitration solely with regard to labor disputes. The present dispute between the parties is not a labor dispute.

Appropriate summary judgment rules support the ruling of the trial court. *Gibbs v. General Motors Corporation,* 450 S.W.2d 827 (Tex. 1970); *Great American Reserve Insurance Company v. San Antonio Plumbing Supply Company,* 391 S.W.2d 41 (Tex. 1965); and *Oram v. General American Oil Company of Texas,* 513 S.W.2d 533 (Tex. 1974).

We have considered and overrule all points of error.

The judgment is affirmed."

Petitioner's position has always been that they had the right to refuse to select from the first panel and that

whether or not they did have the right to refuse to select from the first panel was a labor dispute or legitimate dispute which was arbitrable. The Respondent says this is an untenable position and as previously stated, the nature of the union's claim and the meaning of the arbitration clause is evident and any ambiguity is the result of the company's patently impossible, unreasonable interpretation. Therefore, the Court must construe the language of the contract as finally agreed upon in accordance with the ordinary rules of construction and find that the refusal to strike from the first panel is a refusal to arbitrate. In *Communication Workers of America v. Southwestern Bell Telephone Company,* 415 Fed. 2d 35 (5th Cir. 1969) the Court held that arbitration of labor disputes is a matter of contract and not a matter of right. The Courts must decide if the party asking for arbitration is making a claim which on its face, is governed by the contract.

An arbitration clause in the union contract signed by an employer whose business affects interstate commerce can be enforced in the Courts.

The Court cannot compel a party to a collective bargaining agreement to submit to arbitration without a judicial determination that the agreement does in fact create such a duty. *John Wiley & Son,* supra. The interpretation of the arbitration clause remains a judicial function in the typical case. *International Union of Operating Engineers, Local 139 v. Carl Morse, Inc.,* 529 Fed. 2d 574 (7th Cir. 1976).

Simply stated, it is our position that the Petitioner has wholly breached the contract and that the breach of the contract is subject to enforcement by the Courts and is not an arbitrable dispute.

It has always been held that the party claiming that arbitrability is for an arbitrator bears the burden of proof and must show that collective bargaining agreement contains an arbitration clause which clearly manifests such an intention. *Associated Milk Dealers, Inc. v. Milk Dealers Union, Local 753, et al,* 422 Fed. 2d 546 (7th Cir. 1970). Petitioner states that the subsequent filing of the grievance short of arbitration was some kind of a waiver to the suit for specific performance, however, the Petitioner has cited no authority to support this position and we would respectfully point out to this Court that the suit to compel arbitration by specific performance was filed on or about the 8th day of November and that most of the correspondence pertaining to the second grievance happened subject to the suit and no arbitrator has been selected up to the present time in the subsequent grievance.

This dispute involves a clear breach of a contract and not a labor dispute as Petitioner would like this Court to believe.

Petitioner would like this Court to say that there is a labor dispute over their refusal to select from the first panel, but this Court knows that to create a good faith dispute, there must be some foundation. There must be good faith to create a dispute. Otherwise, there exists no bonafide dispute which may be submitted to arbitration and Respondent contends that there is no foundation for the position taken by the Petitioner in their refusal to strike from the first panel furnished in direct violation of the contract language in the arbitration provision and therefore, there could never be an arbitrable dispute because there is no foundation and said position is frivolous.

Therefore, the Trial Court correctly found breach of contract as a matter of law and ordered specific performance of the collective bargaining agreement requiring the Petitioner to strike from the first list of arbitrators submitted and the Honorable Court of Civil Appeals correctly affirmed the Trial Court judgment. The Supreme Court of Texas decision to refuse the Writ of Error was also correct.

CONCLUSION AND PRAYER

For these reasons and based upon the authorities cited, we submit the Court of Civil Appeals correctly sustained the lower Court's judgment and that this Honorable Court should not review the Petitioner's Writ of Certiorari.

Respectfully submitted,

EDWARDS AND ASSOCIATES
P. O. Box 1468
Lubbock, Texas 79408

By: _____
JAMES R. EDWARDS
Attorney for Respondent,
International Union of Operating
Engineers, Local 826

CERTIFICATION OF SERVICE

This is to certify that three copies of the foregoing Answer to Petitioner's Petition for Writ of Certiorari has been forwarded to the attorney for the Petitioner, Mr. Durwood D. Crawford, 4245 First International Building, Dallas, Texas on this 13th day of March, 1980.

By: _____
JAMES R. EDWARDS

Attorney for Respondent,
International Union of Operating
Engineers, Local 826